

09-09-2002

THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK AND APPEAL BOARD

IN THE MATTER OF TRADEMARK REGISTRATION NO. 2,372,585  
Registered August 1, 2000

BOYDS COLLECTION, LTD.,  
Petitioner,

v.

HERRINGTON & COMPANY, INC.,  
Registrant.

Cancellation No. 32,146

Mark: TBC HERRINGTON'S TEDDY  
BEAR CLUB & Design

Registration No.: 2,372,585Registration Date: August 1, 2000

**REGISTRANT'S REPLY TO PETITIONER'S RESPONSE TO  
MOTION FOR JUDGMENT**

**I. INTRODUCTION**

After receiving the Motion for Judgment filed by Registrant HERRINGTON & COMPANY, INC. ("Registrant") on July 31, 2002, Petitioner filed a response thereto on August 20, 2002 (the "Response"). The Response purports to show cause why the Motion for Judgment should not be entered against Petitioner in the above captioned cancellation action for Petitioner's failure to prosecute this action.

Petitioner's Response claims that it did file a Notice of Reliance before the close of its testimony period. But it is undisputed in the Response that Petitioner failed to conduct any discovery in this case, failed to take any testimony in this case and that the only document filed during the Petitioner's testimony period was a Notice of Reliance that was filed on April 22, 2002—the closing day of the Petitioner's testimony period.

Registrant hereby objects to this "Response", and requests that if the Board considers the Notice of Reliance or any of the alleged evidence contained therein, that it also consider Registrant's Motion to Strike and objections thereto discussed in a separate brief in Registrant's Motion to Strike, to be filed on September 10, 2002.

**II. ARGUMENTS**

On April 22, 2002, on the closing day of its testimony period in the above-captioned action, Petitioner claims to have submitted a Notice of Reliance in this case. From the face of

the papers, it is evident that the Notice of Reliance is both procedurally and substantively deficient without cure. Not only does the Notice of Reliance fail to comply with the procedural requirements of the Trademark Rules, but the documents that Petitioner is giving notice of its reliance on are inadmissible under the Federal Rules of Evidence and TBMP § 700 *et seq.*

In its Response, Petitioner seeks to cure one of the procedural defects in its Notice of Reliance by apologizing to the Board for its "oversight" in not serving Registrant with a copy of the Notice of Reliance as required by TBMP § 113 and 37 C.F.R. § 2.119.<sup>1</sup> However, as to the other blatant procedural and substantive defects in the Notice of Reliance and the "Evidence Declaration," Petitioner has said nothing and has made no attempt to cure these defects. The numerous and manifest deficiencies in Petitioner papers are the result, once again, of Petitioner's failure to adhere or even attempt to follow the TTAB's procedural standards. Furthermore, these defects are on the face of the papers and have no available cure. Thus, the Notice of Reliance should be stricken in whole.

Under 37 C.F.R. § 2.132(a) and TBMP § 535.02, if the petitioner fails to take testimony or offer any other evidence during its testimony period, the defendant may move for judgment for dismissal of the action based upon petitioner's failure to prosecute. In the instant action, Petitioner has failed to conduct *any* discovery in this action within the dates set by the TTAB and has failed to take *any* testimony or offer *any* other **ADMISSIBLE** evidence during its testimony period. Accordingly, Registrant hereby moves for dismissal of this action based upon Petitioner's failure to prove its case and failure to perform or take any act to prosecute this action.

### **III. CONCLUSION**

Registrant has requested in its separate motion (which it incorporates herein by reference) that the Board strike the Notice of Reliance as a whole as it fails to meet the fundamental and basic procedural and substantive requirements for such motion filing with the TTAB. Because the defective Notice of Reliance was filed on the last day of the testimony period (and served much later) with *no other* discovery, testimony or notices of reliance

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<sup>1</sup> There is no explanation for how this "apology" is supposed to cure the prejudice caused to Respondent. By failing to serve the, albeit defective, Notice of Reliance until after the close of Registrant's testimony period, it has completely denied Registrant any opportunity to take and submit responsive testimony or otherwise address the contents of the Notice of Reliance.

submitted, Registrant respectfully requests, once again, that the Board grant Registrant's Motion for Judgment against Petitioner for failure to prosecute this action.

Dated: September 9, 2002

Respectfully submitted,  
**HERRINGTON & COMPANY, INC.**

By: 

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P. Craig Cardon, Esq.

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Attorneys for Registrant

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2002, I served a copy of the foregoing REGISTRANT'S REPLY TO PETITIONER'S RESPONSE TO MOTION FOR JUDGMENT upon petitioner Boyds Collection, Ltd.'s counsel of record, Michael J. Cherskov, Esq., by mailing a true and correct copy thereof by postage prepaid First Class United States Mail to the following address:

Michael J. Cherskov  
CHERSKOV & FLAYNIK  
The Civic Opera Building, Suite 1447  
20 N. Wacker Drive  
Chicago, IL 60606

DATED: September 9, 2002

By: Sadie Lum  
Name: Sadie Lum

Express Mail mailing label No. **EL 952565427 US**

Date of Deposit **September 9, 2002**

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: Commissioner for Trademark, 2900 Crystal Dr., Arlington, VA 22202-3513.

Sadie Lum

(Type or Print Name of Person Mailing Paper or Fee)

*Sadie Lum*

(Signature of Person Mailing Paper or Fee)

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September 9, 2002

**BY U.S. EXPRESS MAIL**

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09-09-2002

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513  
Attention: Legal Assistant, TTAB

**Re: Cancellation No.: 32,146**  
**Mark: TBC HERRINGTON'S TEDDY BEAR CLUB & Design**  
**Registration No.: 2,372,585**  
**Registration Date: August 1, 2000**  
**Registrant: Herrington & Company, Inc.**  
**Our Ref.: 40362.6**

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TTAB  
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Dear Sir or Madam:

Enclosed herewith is Registrant's Reply to Petitioner's Response to Motion for Judgment for the above referenced matter. So that we may have a timely record of receipt of the enclosed, please date-stamp the enclosed, stamped, self-addressed post card, and deposit it into the U.S. mail.

Please direct all correspondence regarding this matter to my attention.

Very truly yours,



Elizabeth Moreno McArthur  
Attorney at Law

EMM/sl

Enclosure  
Copy: P. Craig Cardon